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MINUTES DECEMBER 3, 2004

Call to Order

The Board of Environmental Review's regularly scheduled meeting was called to order by Chairman Russell at 9:05 a.m., on Friday, December 3, 2004, in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana.

Attendance

Board Members Present: Chairman Joseph Russell, Ward Shanahan, Dr. Garon Smith, David Fishbaugh, Susan Brooke, Kim Lacey (via telephone) and Russell Hudson (via telephone)

Board Attorney Present: Tom Bowe, Attorney General's Office, Department of Justice

Board Secretary Present: Joyce Wittenberg

Court Reporter Present: Laurie Crutcher, Crutcher Court Reporting

Department Personnel Present: Jan Sensibaugh, Director; Tom Livers, Deputy Director; Tom Ellerhoff, Director's Office (DIR); Lisa Peterson, DIR; John North, Chief Legal Counsel; Jim Madden, Legal, DIR; Claudia Massman, Legal, DIR; Keith Christie, Legal, DIR; Ed Hayes, Legal, DIR; Keith Jones, Legal, DIR; David Rusoff, Legal, DIR; Steve Welch, Administrator, Permitting & Compliance Division (PCD); Ed Thamke, Waste & Underground Tank Management Bureau, PCD; Eugene Pizzini, Public Water Supply & Subdivisions Bureau (PWSSB), PCD; Jon Dillard, PWSSB, PCD; Jan Brown, Air Resources Management Bureau (ARMB), PCD; Charles Homer, ARMB, PCD; Don Vidrine, ARMB, PCD; David Klemp, ARMB, PCD; Bonnie Lovelace, Water Protection Bureau (WPB), PCD; Kari Smith, WPB, PCD; Moriah Peck, WPB, PCD; Neil Harrington, Industrial & Energy Minerals Bureau, PCD; John Arrigo, Administrator, Enforcement Division; Art Compton, Administrator, Planning, Prevention & Assistance Division (PPAD); Robert Bukantis, Water Quality Planning Bureau, PPAD

Interested Persons Present (*Disclaimer: Names are spelled as best they can be read from the official sign-in sheet.*): Gail Abercrombie, Montana Petroleum Association; Harmon Ranney, PRG LLC; Julie DalSoglio, Montana EPA; Don Allen, Western Environmental Trade Association; Steve Pilcher, Montana Stockgrowers Association; Jennifer McKee, Lee News

I.A. Review and approve minutes of October 1, 2004, meeting.

Dr. Smith noted a typographical error on Page 3, at II.B.2 in the third paragraph – the word “to” should be deleted. He MOVED to adopt the minutes with the change. Mr. Shanahan SECONDED the motion. The motion CARRIED with a unanimous VOTE.

I.B. Set 2005 meeting schedule.

Chairman Russell identified a conflict with the March 25 date.

Mr. Livers said the March 25 date could be moved to April 1. Board members agreed that would be a better date and that they had no conflicts with the rest of the dates.

Chairman Russell called for a motion to adopt the 2005 meeting schedule with the change from March 25 to April 1. Ms. Lacey so MOVED. Ms. Brooke SECONDED the motion. The motion CARRIED with a unanimous VOTE.

II.B.1 TMDL Update

Mr. Compton referenced a graph that had been included in the Board packet mailing, which provided information about TMDL activities. He also noted that 200 TMDLs would have to be completed each year in order to meet the 2012 deadline for completion.

Mr. Compton explained that the DEQ has limited dedicated resources. He said the department was asking for additional resources from the upcoming Legislature. He noted that a consent decree was signed about two weeks previous in the Federal District Court in Missoula. A rigorous pace of work is required under that decree.

Mr. Livers announced that DEQ had received a letter from the Tongue River water users.

Mr. Compton provided a summary of the letter and recapped the development of numeric standards, which are intended to protect beneficial uses, not assimilative capacity. He explained that the DEQ had invested a full year and a half million dollars on a water quality model and that the model shows that the Upper Tongue River is not impaired. He reiterated that the DEQ does not do TMDLs for waters that aren't impaired. He explained that the DEQ was using the model and coordinating with Wyoming in a collaborative process to reach consensus for the water quality numbers upstream at the Wyoming border. TMDLs will be done where the Tongue River is impaired, which is downstream of the T & Y Ditch.

Mr. North explained that the TMDL process, by statute, is designed for waters that have been classified as threatened or impaired. He explained that the statute provides a prioritization process, which is mandatory, and that the DEQ has followed it.

Discussion took place regarding verification of the modeling work and reverse osmosis treatment of the CBM wastewater. In response to a comment from Mr. Shanahan, Mr. Compton said that the Department is negotiating with Wyoming about the division of assimilative capacity. In response to a comment from Mr. Hudson, Mr. Compton explained that the Tongue River naturally has more sediment and is warmer than cold, high gradient waters in western Montana. The Tongue River supports the beneficial uses that it is classified for such as agriculture and a warm water fishery. Mr. Compton confirmed that there were about 42 monitoring sites on the upper waters of CBM country. The model almost exactly replicates existing conditions. The Department thinks the modeling will lead to good TMDL decisions.

The Board concluded that a response to the letter would be drafted by the DEQ. Dr. Smith and Chairman Russell commented that CBM development in Wyoming creates a potential threat to the river.

- II.A.1.a In the matter of M&W Investments, Inc.'s appeal of two subdivision application non-degradation decisions and a deviation request denial, EQ #01-1457 and #00-1822.

Mr. Bowe informed the Board that the attorneys had requested to reschedule the prehearing conference. It is now scheduled for February 4, 2005.

- II.A.1.b In the matter of CR Kendall Corporation's request for a hearing to appeal DEQ's decision to deny a minor permit amendment, BER 2002-09 MM.

Mr. Bowe had nothing to add beyond the information provided on the agenda.

- II.A.1.c In the matter of the Petition for Review of Hazardous Waste Final Permit No. MTHWP-03-01 issued to Flying J Petroleums, Inc., BER 2003-14 HW.

Mr. Bowe had nothing to add beyond the information provided on the agenda.

- II.A.1.d In the matter of violations of the Montana Underground Storage Tank Act at Big Sky Truck Stop, BER 2004-07 UST.

Mr. Bowe had nothing to add beyond the information provided on the agenda.

- II.A.1.e In the matter of the request for hearing of Lang Creek Brewery, Inc., BER 2004-13 WQ.

Mr. Bowe had nothing to add beyond the information provided on the agenda.

- II.A.1.f In the matter of violations of the Montana Underground Storage Tank Act at Can-Am Convenience Store, BER 2004-03 UST.

Mr. Bowe, on behalf of Ms. O'Sullivan, explained that a hearing was held in late October in Plentywood and that a proposed decision had been issued. He said the attorneys had until December 17, 2004, to propose a schedule for filing exceptions and briefs.

II.B.2 | 2005 Rulemaking Briefing

Mr. Livers explained that a formal schedule had not been produced, but that a more formal schedule would be ready for mailing to the Board before the January meeting. He provided information on rules that were expected to come before the Board in 2005.

III.A.1 | In the matter of the final adoption of proposed amendments to ARM 17.38.100 and 17.38.200.

Mr. Pizzini explained that the new rules accommodate new federal requirements and provide clarification of those requirements. Other proposed amendments included updating and correcting citations, revising rules for wording consistency, and rule clarification.

Mr. Pizzini said the MAR Notice had been published on October 21, 2004, and that a public hearing was held November 15. He said one member of the public was present and that he made two comments, both of which were outside the scope of this rulemaking. He informed the Board that no written comments were received.

Chairman Russell opened the floor for public comment on the matter. There was no response.

Chairman Russell called for a motion to amend the rules and to adopt the presiding officer's report and the 521 and 311 analyses. Mr. Shanahan so MOVED. Ms. Brooke SECONDED the motion. The motion CARRIED with a unanimous VOTE.

III.A.2 | In the matter of the final adoption of new rules establishing a system of registration in lieu of permitting and amendment of ARM 17.8.504, 505 and 744.

Mr. Homer reminded the Board that at its June 4 meeting, it had initiated rulemaking to establish a system of registration in lieu of permitting for nonmetallic mineral processing facilities. He said a public hearing was held July 14, at which the DEQ received comments from two interested parties, one supportive of the rule and the other, EPA, did not believe the rule, as proposed, would be approvable as a SIP change.

Mr. Homer offered three options to the Board: 1) adopt the rule as proposed; 2) adopt a rule as EPA proposes; or 3) take no action on the rulemaking. He said the latter was the best option in the DEQ's view. Mr. Homer said the Department would continue discussions with EPA.

Discussion took place regarding the SIP, the permitting process and the proposed registration process, and the differences between the permitting and registration processes. Dr. Smith said that the registration proposal left the public out of the process. Mr. Homer said that a general permit approach would address that concern.

Ms. Brooke said the proposed registration system was based on legislation. Mr. Homer said that the legislation was permissive and did not require a registration system and was not specific to non-metallic mines. Chairman Russell said that the Legislature should be informed. Mr. Homer said that the Contractor Association had been informed and did not oppose delay in adoption of a registration rule.

Chairman Russell opened the floor for public comment. No one responded.

Mr. Shanahan MOVED to adopt the DEQ's recommendation. Ms. Brooke SECONDED the motion. The motion CARRIED with a unanimous VOTE.

III.B.1 In the matter of the request for rule initiation to amend rules at ARM 17.38.106 pertaining to collection of fees for plan and specification review.

Ms. Brooke recused herself from the rulemaking because she holds a public water supply permit.

Mr. Pizzini explained that the rule initiation request was to amend existing fees for the review of required plans and specifications submitted for public water and wastewater systems, and to adopt new rules for housekeeping purposes and clarifications. He said legislative audits identified that the DEQ does not recover its costs for public water supply system reviews of plans and specifications as required by law. He said the DEQ does not recover costs associated with wastewater system reviews either.

Mr. Pizzini informed the Board that the proposed fee increases would increase existing fees by a minimum of 200 percent and some as high as 400 percent, as those fees apply to new systems or to modifications of existing systems. Applications being processed now would continue under the current fees. He provided information regarding how the fee changes were determined. He said the DEQ recommends initiation of rulemaking, appointment of a hearing officer and setting a hearing date.

Chairman Russell called for a motion to initiate the rulemaking and to appoint Mr. Bowe presiding officer. Mr. Hudson so MOVED. Ms. Lacey SECONDED the motion. The motion CARRIED with a 6-0 VOTE.

III.B.2 In the matter of the request for rule initiation to amend rules at ARM Title 17, Chapter 30, Subchapter 13 pertaining to concentrated animal feeding operations (CAFOs).

Ms. Smith explained that the proposed rule changes are consistent with federal requirements. She said Montana became a delegated state in 1976, at which time there were feedlot regulations. She said the discharge permit allows an operation to discharge pollutants as long as the operation meets the requirements in that permit.

Ms. Smith explained that the EPA published revisions and updated the CAFO rules and required delegated states to revise the state rules to reflect the federal changes. She provided detailed information about the specific changes. She talked about the public

involvement process that the DEQ had already started, which included informational meetings and mailings to interested and affected persons. She said comments contained major issues regarding the circular, but not the rule package.

Ms. Smith requested that if the Board initiates the rulemaking, the DEQ be allowed to offer an extended comment period. She said the DEQ requests that the Board initiate the rulemaking and appoint a presiding officer.

Discussion took place concerning the extension of time for public comment that was requested.

Mr. Pilcher expressed support for DEQ's recommendation to initiate rulemaking, but requested a 60-day comment period. He said there were a lot of things that would be viewed as significant changes.

Discussion commenced regarding wording within the rules in the MAR Notice on pages 16 and 17. It was decided that the rule needed to specify that the circular is being adopted by reference.

Mr. Shanahan MOVED that the Board adopt DEQ's recommendation with the suggested change and with an extended comment period until February 4, 2005, and to appoint Mr. Bowe the presiding officer. Ms. Brooke SECONDED the motion. The motion CARRIED with a unanimous VOTE.

III.C.1 In the matter of final action regarding the request for hearing of Old Mill Peninsula Homeowners Association pertaining to Ward Crushing Tricon Pit #3, BER 2004-14 OC.

Mr. Bowe explained that the petitioners in this case have asked for a voluntary dismissal and that a proposed order was included in the Board packets.

Mr. Shanahan MOVED that the Chairman be authorized to sign the order. Mr. Fishbaugh SECONDED the motion. The motion CARRIED with a unanimous VOTE.

III.C.2 In the matter of final action regarding the request for hearing of Jim and Glenda Anderson pertaining to the Christiansen Pit, BER 2004-10 OC.

Mr. Bowe said the parties had decided not to file exceptions to his proposed decision, so the Board only needed to approve the proposed decision.

Mr. Shanahan MOVED that the Chairman be authorized to sign the proposed decision. Ms. Brooks SECONDED the motion. Dr. Smith and Ms. Brooke commented about a statement made by the petitioners in a demand for a full Board hearing that suggested that the hearing examiner was not neutral. The Board is neutral and the Board's hearing examiner is neutral. The motion CARRIED with a unanimous VOTE.

III.C.3 | In the matter of final action regarding violations of the Montana Asbestos Control Act by IIC, Inc., BER 2004-01 ASB.

Mr. Bowe explained that this case had settled months ago, but that payment arrangements had been provided for under the settlement. He said the payments had been completed and an order of dismissal was included in the packets.

Chairman Russell called for a motion to authorize the Chairman to sign the order. Ms. Brooke so MOVED. Dr. Smith SECONDED the motion. The motion CARRIED with a unanimous VOTE.

A brief discussion took place regarding the status of the Holcim tire-burning permit.

III.D.1 | In the matter of violations of the Montana Water Quality Act by the City of Lewistown Wastewater Treatment Plant, BER 2004-15 WQ.

Mr. Bowe explained that the appeal was dated May 5, 2003, but that it was faxed October 20, 2004, and that according to the administrative penalty order there had been several instances where sewage was discharged in Big Spring Creek. He said that the deadline for the parties to propose a schedule is February 28, 2005, since the parties requested extra time in order to try to work out a settlement. Mr. Bowe also said he was available to be the hearing examiner.

Chairman Russell called for a motion to appoint Mr. Bowe permanent hearing examiner for this case. Mr. Shanahan so MOVED. Ms. Lacey SECONDED the motion. The motion CARRIED with a unanimous VOTE.

III.D.2 | In the matter of the request for hearing of Nature View Estates, BER 2004-16 SUB.

Mr. Bowe explained that this was a case of a subdivision that didn't get approved because of water supply deficiencies. Mr. Bowe said the parties have requested an additional 90 days to propose a schedule in order to try to might work out a settlement. He said the new deadline is March 3, 2005. Mr. Bowe indicated he was available to be the hearing examiner for the case.

Dr. Smith recused himself from this case since the Missoula City-County Health Department is a party to it and he is vice chairman of their Board of Health.

Mr. Shanahan MOVED to appoint Mr. Bowe permanent hearing examiner for this case. Ms. Brooke SECONDED the motion. The motion CARRIED with a 6-0 VOTE.

IV. | General Public Comment

Mr. Ranney, on behalf of Powder River Gas, provided the Board with an update on progress of the company's coalbed natural gas project in Southeastern Montana. He provided information about the MPDES permit, saying it was the first permit to

incorporate treatment of produced water to meet the new EC and SAR standards that the Board developed.

Mr. Ranney informed the Board of a series of articles in a publication titled "Inside the EPA" that discussed the vacancies on the Board, and some possible ways to fill them.

Mr. Shanahan commented that an article had incorrectly named him as a dissenter on the effluent standards of salinity and sodium absorption. He said he had voted for those standards. Mr. Shanahan and Mr. Hudson commented about their experiences as Board members. Chairman Russell thanked DEQ Director Sensibaugh for her service.

V. Adjournment

Chairman Russell called for a motion to adjourn. Ms. Lacey so MOVED. Dr. Smith SECONDED the motion. The motion CARRIED with a unanimous VOTE.

The meeting adjourned at 11:46 a.m.

Board of Environmental Review December 3, 2004, minutes approved:

JOSEPH W. RUSSELL, M.P.H.
CHAIRMAN
BOARD OF ENVIRONMENTAL REVIEW

DATE